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CIVIL AND POLITICAL RIGHTS, INCLUDING THE QUESTION OF INDEPENDENCE OF THE JUDICIARY, ADMINISTRATION OF JUSTICE, IMPUNITY

Report of the Special Rapporteur on the independence of judges and lawyers, Dato' Param Cumaraswamy, submitted in accordance with Commission resolution 2000/42

Addendum

Mission to the Slovak Republic*

* The executive summary of this mission report is being circulated in all official languages. The report itself is contained in the annex to the executive summary and is being circulated in the language of submission only.

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Executive summary

The present report concerns a mission to the Slovak Republic undertaken from 27 to 29 November 2000, by the Special Rapporteur on the independence of judges and lawyers, pursuant to the mandate contained in Commission on Human Rights resolution 1994/41, as renewed by resolutions 1997/23 and 2000/42 extending the mandate for a further three years.

The Special Rapporteur had received information that the Government of the Slovak Republic had proposed to the National Council of the Slovak Republic (hereinafter referred to as Parliament) the removal of the President of the Supreme Court, the Hon. Dr. Stefan Harabin. The Government set out several grounds for the removal of Dr. Harabin alleging that he no longer had the moral authority to remain as President of the Supreme Court. The Government justified its proposal on the basis that he was not being removed as a judge, merely the office of President of the Supreme Court. Upon request from the Special Rapporteur, the Government agreed to a mission in order to clarify the matters involved. After the mission, on 19 December 2000, Parliament defeated the Government's proposal.

In the course of the mission the Special Rapporteur met with, among others, the President of the Supreme Court, Dr. Stefan Harabin; the Minister of Justice; the President of the Association of Judges of Slovakia and Vice-President of the Supreme Court, as well as two of his associates; the Head of the Slovak Union of Independent Judiciary; the Chairman and representatives of the Constitutional and Legal Affairs Committee of Parliament; the former President of the Constitutional Court; the former President of the Supreme Court; the Vice-Speaker of Parliament.

In the Slovak Republic the independence of the judiciary and the independence of individual judges are provided for under the Constitution. However, judicial appointment, promotion and removal procedures vest too much power in the executive and legislative arms of the Government and in particular the Minister of Justice. These procedures are inconsistent with the concept of judicial independence as entrenched in the Constitution and provided for in regional and international standards for judicial independence.

Dr. Harabin was elected President of the Supreme Court from among the judges of that court for a five-year term in accordance with article 145 (2) of the Constitution. Although allegations have been made that his election was politically motivated, its legality is not questioned.

The Constitution provides only for the election of the President and Vice-President of the Supreme Court and not for any other courts save the Constitutional Court, whose President and Vice-President are appointed by the President of the Republic. Hence the office of the President and Vice-President of the Supreme Court are constitutional positions and not simple legislative appointments. The persons elected to these offices from among their peers for a fixed term of five years retain their status as judges and no distinction can be made between the offices.

The Government's contention that the office of the President is distinct from the office of judge - and as such the constitutional prerequisites for the removal of a judge do not apply - is therefore untenable. The Government's contention that while acting in his capacity as President of the Supreme Court a judge is part of the executive arm of the Government conflicts with the very essence of an independent judiciary as provided for in article 141 of the Constitution. In effect it would mean that the President of the Supreme Court is a functionary of the executive.

Further, the constitutional security of tenure of five years given to the President is violated if he can be removed before the expiry of his term at the whims of the executive and Parliament. Security of tenure is one of the core values of judicial independence.

Even though section 50 (2) of Act No. 335/1991 on Courts and Judges provides for the process of removal and section 8 of Act No. 80/1992 on State Administration of Courts was invoked to justify the Government's proposal, the Special Rapporteur is of the view that these laws, even if applicable, are inconsistent with the minimum standards provided under international and regional instruments to secure an independent judiciary.

The Minister of Justice asserted that this procedure had been used previously to remove a vice-president of the Supreme Court, and that this removal and the procedure followed had been upheld by the Constitutional Court. The Special Rapporteur observes that the mere fact that such a procedure was adopted previously does not provide constitutional legitimacy to the present steps taken to remove Dr. Harabin. The Minister also made reference to a recent judgement of the Constitutional Court on a petition presented to it by Dr. Harabin soon after the Government's proposal to remove him from the office of President of the Supreme Court. The Special Rapporteur notes that in neither of the two judgements did the Constitutional Court pronounce itself on the constitutionality of the removal procedure.

It is inconceivable that a judge elected by Parliament to be President of the Supreme Court for a fixed term could be removed from the office of President on mere allegations by the Government without those allegations being proved before a competent tribunal. The grounds asserted by the Government for the removal of Dr. Harabin remain mere allegations. Although the allegations are serious enough to initiate the disciplinary process specified in Act No. 412/1992 on Disciplinary Responsibility of Judges, this has not been done and there are indications that the Government may not have sufficient evidence to substantiate the grounds for removal before a disciplinary court.

Judges are also entitled to justice. They are entitled to due process of law if they are to be removed before the expiry of their term of office. Principles 17-20 of the United Nations Basic Principles on the Independence of the Judiciary underscore this point.

The Special Rapporteur is of the view that the Government's attempt to remove Dr. Harabin as President of the Supreme Court through the parliamentary process, without proving its allegations before a competent tribunal provided for by law, violates international and regional standards to secure and preserve an independent judiciary. The Government's haste in wanting to remove Dr. Harabin as President of the Supreme Court shortly before the coming into force of a constitutional amendment which provides for an independent mechanism for the

appointment and removal of judges, including the President and Vice-President of the Supreme Court, further adds to the perception that the attempt to remove Dr. Harabin was politically motivated.

The Special Rapporteur commends the deputies of the Slovak Parliament for having defeated the Government's motion to remove Dr. Harabin as President of the Supreme Court. Parliamentary democracy in the Slovak Republic, and in particular supremacy of Parliament under the Constitution, is clearly demonstrated in this matter. By following this course Parliament has upheld the independence of the judiciary of the Slovak Republic.

The Special Rapporteur welcomes the proposed amendment to establish an independent judicial council to advise on the appointment and removal of judges, including the appointment of the President and Vice-President of the Supreme Court. However, it appears that under article 145 (3) of that amendment the President or Vice-President of the Supreme Court can be removed from office before the expiry of the five-year term by the President of the Slovak Republic without a recommendation of the Judicial Council. This is inappropriate considering that the same article expressly requires a recommendation from the Council for their appointments. The President and Vice-President must be given a fair hearing by a competent tribunal provided under the law.

The Special Rapporteur recommends that the removal of the President or Vice-President before the expiry of the five-year terms of office must be for reasons provided by the Constitution for the removal of judges and must be on the recommendation of the Judicial Council. Once appointed as President or Vice-President those offices should not be distinguished from the judicial offices.

The divisions within the judiciary resulting from the political nature of the attempt to remove Dr. Harabin have to be addressed in the interest of a unified judiciary for the dispensation of justice in accordance with the rule of law.

Finally, the Special Rapporteur recommends that the Supreme Court be housed in adequate, distinct and separate premises from the Ministry of Justice or any other government department so that this apex court of the Slovak Republic will be seen as independent from the executive arm of Government.

Annex

REPORT OF THE SPECIAL RAPPORTEUR ON THE INDEPENDENCE OF JUDGES AND LAWYERS ON HIS MISSION TO THE SLOVAK REPUBLIC (27-29 NOVEMBER 2000)

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Introduction

1. The present report concerns a mission to the Slovak Republic undertaken from 27 to 29 November 2000 by the Special Rapporteur on the independence of judges and lawyers, pursuant to the mandate contained in the Commission on Human Rights resolution 1994/41, as renewed by resolutions 1997/23 and 2000/42 extending the mandate for a further three years. This mandate calls upon the Special Rapporteur, inter alia, to inquire into any substantial allegations transmitted to him and report his conclusions thereon.

2. In September 2000 the Special Rapporteur received information that the Government of the Slovak Republic (hereinafter referred to as the Government) had proposed to the National Council of the Slovak Republic (hereinafter referred to as Parliament) the removal of the President of the Supreme Court, the Hon. Dr. Stefan Harabin. It was alleged that the proposal had been initiated by the Minister of Justice. It was further alleged that under the Constitution of the Slovak Republic, Parliament could only remove a judge, including the President or Vice-President of the Supreme Court, for the reasons expressed in the Constitution. It was also alleged that Dr. Harabin was elected as President for a period of five years and the proposal to remove him for reasons not expressed in the Constitution before the expiry of the five years was unconstitutional.

3. In the light of the seriousness of these allegations and their impact on the independence of the judiciary in the Slovak Republic, the Special Rapporteur intervened on 28 September 2000 with an urgent communication to the Government, expressing his concern and seeking the Government's response. As the debate on the issue of removal in Parliament was imminent, the Special Rapporteur later issued a press statement from Geneva.

4. While waiting for the Government's response, the Special Rapporteur received further information that the Government was justifying its proposal to remove Dr. Harabin on the basis that he was being removed from the office of the President of the Supreme Court and not as a judge and as such there was no requirement to conform with the constitutional prerequisites and disciplinary procedures provided by law. The Special Rapporteur again intervened and sent a further communication on 13 October 2000 expressing his concern over resort to such a distinction to remove Dr. Harabin as President of the Supreme Court.

5. On 25 October 2000, the Special Rapporteur received a response from the Government to his communication of 29 September 2000. The Government confirmed that its proposal before Parliament was to remove Dr. Harabin from the office of the President and not as a judge. The Government also set out several grounds for the removal, alleging that for those reasons Dr. Harabin no longer had the moral authority to remain as President of the Supreme Court.

6. The Special Rapporteur then sought an urgent mission to Slovakia to meet the various personalities involved in the matter and to obtain a clearer understanding of this serious situation. The Government responded promptly and a mission was scheduled for three days commencing on 27 November 2000.

7. The mission was confined to the single issue of whether the proposal to remove Dr. Harabin, at the behest of the Government, by Parliament violated the constitutional, international and regional standards on judicial independence.

8. In the course of the mission the Special Rapporteur met the following personalities in the capital, Bratislava: the President of the Supreme Court, Dr. Stefan Harabin; the Minister of Justice, Jan Carnogursky; the President of the Association of Judges of Slovakia and Vice-President of the Supreme Court, Juraj Majchrak, and two of his associates; the Head of the Slovak Union of an Independent Judiciary, Miroslav Jamrich; the Chairman and representatives of the Constitutional and Legal Affairs Committee of the Parliament; university professor Milan Cic (former President of the Constitutional Court); the Vice-Speaker of Parliament; the former Vice-President of the Supreme Court, Dr. Stefanko; and lawyer Jan Hrubala.

9. The Special Rapporteur also met Thomasz Anusiewicz, Human Rights Adviser to the United Nations Development Programme (UNDP), Bratislava.

10. At the end of the mission, in view of the intense media interest on the issue of Dr. Harabin's removal, the Special Rapporteur held a press conference on 29 November 2000 on the premises of the Supreme Court.

I. THE CONSTITUTION AND THE JUDICIARY

11. The Constitution of the Slovak Republic, which was adopted on 1 September 1992 and entered into force on 1 January 1993, declares the Slovak Republic to be an independent and democratic State. The Constitution provides for a parliamentary system of government, with separation of powers and an entrenched bill of rights.

12. Article 141 of the Constitution provides that the judiciary shall be administered by independent and impartial courts and "shall be independent of other branches of government at all levels". Article 144 provides that judges "shall be independent and bound only by law". The same article also provides that judges shall be bound "also by international instruments if so provided by the Constitution and the law".

13. Article 145 of the Constitution provides as follows:

> "(1) A judge shall be elected by the National Council of the Slovak Republic on the advice of the Government of the Slovak Republic for a four-year term. Upon the completion of this term, the National Council, on the advice of the Government of the Slovak Republic, shall elect the judge again for an indefinite term;
>
> "(2) The President and Vice-Presidents of the Supreme Court of the Slovak Republic shall be elected by the National Council of the Slovak Republic from among the judges of the Supreme Court for a five-year term for no more than two consecutive terms."

14. Article 147 provides as follows:

"(1) A judge shall be removed from office by the National Council of the Slovak Republic:

"(a) Upon a conviction of a malicious offence;

"(b) Upon a disciplinary measure imposed for professional misconduct.

"(2) The National Council of the Slovak Republic may remove a judge:

"(a) Who has been unable to perform judicial duties for reasons of bad health for not less than one year;

"(b) Who has attained sixty-five years of age.

"(3) Prior to such removal, the National Council of the Slovak Republic shall require the opinion of the appropriate disciplinary tribunal."

15. Article 11 of the Constitution provides that international instruments on human rights and freedoms ratified by the Government and promulgated under statutory requirements shall take precedence over national laws, provided that the international treaties and agreements guarantee greater constitutional rights and freedoms.

16. Slovakia has ratified several of the major international instruments on human rights including the International Covenant on Civil and Political Rights and the Optional and Second Optional Protocols to the Covenant and the International Covenant on Economic, Social and Cultural Rights. Slovakia became a member of the Council of Europe in 1993 and has submitted to the jurisdiction of the European Court of Human Rights. It is awaiting admission to the European Union.

17. The judiciary consists of the Constitutional Court and the general and military court systems. Chapter 1, Part 7 of the Constitution regulates the activities of the Constitutional Court. The Court has the jurisdiction, inter alia, to determine the constitutionality of laws, regulations and generally binding rules and any conflicts between such legal instruments, and to decide disputes over powers distributed among central government authorities.

18. There are three levels of general courts. At the first level are the district courts which handle the vast majority of cases in the first instance. Regional courts generally serve as appellate courts but in certain circumstances hear cases at first instance. The Supreme Court is an appellate court hearing appeals from regional courts exercising original jurisdiction.

19. There are approximately 1,300 judges serving all these courts. The Supreme Court is composed of 81 judges. The Constitutional Court is composed of 10 judges.

20. The judicial disciplinary process is set out in Act No. 412/1992 on Disciplinary Responsibility of Judges. The Act creates a disciplinary court system consisting of a senate of judges for each level of the court system. Each senate consists of five judges representing that level of the court system and only hears cases involving judges at the same level. For example, in the case of the Supreme Court, the senate would consist of five judges of the Supreme Court.

21. There are two Councils of Judges. The Council of Judges of Slovakia consists of 30 members and is the representative decision-making body for all judges in the Slovak Republic. The Council of Judges of the Supreme Court consists of eight members and is the decision-making body for the judges of the Supreme Court. The views of these councils are sought on the suitability of a judge for election to the office of the President but are not binding on the Government or Parliament.

22. It is pertinent here to refer to section 50 (2) of Act No. 335/1991 on Courts and Judges which prominently featured in the discussions during the mission. This section provides that "A judge may be discharged from the office of President or Vice-President of a court and President of a division of the Supreme Court by the body that appointed him or her to this office. Removal from offices that are mentioned in section 39 (1) and (2) may be performed only upon proposal of the body that submits the proposal for election to these offices." Section 39 (1) states "The President and Vice-President of the Supreme Court are elected from among the judges of this court by the National Council of the Slovak Republic upon proposal of the Government of the Slovak Republic for a five-year term of office and for a maximum of two consecutive terms." The Government used section 50 (2) to justify its proposal to Parliament to remove Dr. Harabin from the office of President of the Supreme Court, without the need to follow the constitutional requirements of article 147.

II. DR. HARABIN'S ELECTION TO THE OFFICE OF PRESIDENT OF THE SUPREME COURT

23. Dr. Harabin was appointed as a judge of first instance on 1 January 1983. In July 1990 he became a judge of the regional court and in January 1993, a judge of the Supreme Court. On 11 February 1998 he was elected by Parliament as the President of the Supreme Court for a five-year term under article 145 (2) of the Constitution.

24. The Minister of Justice alleged that Dr. Harabin's nomination for the office of President of the Supreme Court did not get the support of either of the Councils of Judges. This was refuted by Dr. Harabin. The Special Rapporteur learnt during the mission that there was some debate regarding the final vote in one of the councils but in general the voting in the two councils was about even. Nevertheless the fact remains that there was no dispute as to the legality of Dr. Harabin's election as President of the Supreme Court.

25. Another relevant factor which needs to be noted is that Dr. Harabin was elected on the proposal of the previous Government. Those in the leadership of the present Government were then in the opposition.

III. ASSOCIATIONS OF JUDGES

26. There are three associations of judges in Slovakia. The first and the largest is the Association of Slovak Judges, which was founded in 1990. The other associations are the Slovak Union of an Independent Judiciary and the Association of Women Judges. The current President of the Association of Slovak Judges is also the Vice-President of the Supreme Court. This association supported the Government's proposal for the removal of Dr. Harabin.

IV. GROUNDS FOR THE REMOVAL OF DR. HARABIN

27. The Government in its written responses to the Special Rapporteur specified the following grounds as justifying Dr. Harabin's removal:

(a) His credibility as President of the Supreme Court had been in doubt for a long period;

(b) He did not participate in the efforts of the Minister of Justice to curb corruption in the justice system; he failed to comply with the Minister's request for Presidents and Vice-Presidents of courts to declare their assets;

(c) His support for the District Court of Zilina which issued a "social guarantee" to a Slovak judge who had been charged, convicted and sentenced in the Czech Republic for corruption; the Czech authorities did not release the Slovak judge from imprisonment;

(d) He reduced the Slovak judiciary's credibility by criticizing a proposed amendment to the Constitution;

(e) His failure to take action against a former Vice-President of the Supreme Court, Dr. Stefanko, for illegally entering into his (Dr. Stefanko's) hostel premises where he had lost his right of accommodation;

(f) He prevented Supreme Court judges from participating in the training programmes for young judges;

(g) He failed to prevent a former Vice-President of the Supreme Court, Dr. Stefanko, from hearing suits in which there was a likelihood of bias;

(h) He was involved in the falsification of a decision of the Building Authority concerning the building which houses both the Ministry of Justice and the Supreme Court. It was alleged that the falsified decision was submitted to the Building Authority by a subordinate of Dr. Harabin. (It is important to note that the Supreme Court shares the same building with the Ministry of Justice.)

28. Based on these and "other reasons", the Government on 16 August 2000 proposed to Parliament that Dr. Harabin be removed from the position of President of the Supreme Court.

The Government stated that as President, "he should serve as a moral and professional authority for all judges of the Slovak Republic. His ethical and legal errors provide the reasons for asking Parliament to recall him from the position of President of the Supreme Court".

29. These are serious allegations whether taken individually or in totality and, if proved, are sufficient misconduct for the removal of a judge from office.

30. Dr. Harabin denied each and every allegation and, in his response to the Special Rapporteur, explained his conduct in each of the alleged grounds. He publicly called on the Government to prove these allegations before a disciplinary court. He stated his willingness to the Special Rapporteur to appear before a disciplinary court to determine the truth of the charges.

31. The Minister of Justice during his meeting with the Special Rapporteur was of the view that the Government had the power to request Parliament to remove the Presidents and Vice-Presidents of the courts, including the Supreme Court. He referred to section 50 (2) of Act No. 335/1991 on Courts and Judges. He also referred to Act No. 80/1992 on State Administration of Courts. His contention was simply that the President and Vice-President of the Supreme Court and other courts by virtue of those offices were mere administrative functionaries and therefore they were part of the Government and could be removed at the will of the Government. The Minister of Justice stated that as judges they are members of the judiciary. As the President or Vice-President of a court they are part of the executive. The arrangements and procedures for removal were considered to be part of the country's legal tradition.

32. The Special Rapporteur was also told that the Government need not give reasons for such removals, but reasons were given in this instance to give legitimacy to the removal.

33. The Minister of Justice also said that the Government had on previous occasions removed Vice-Presidents of the Supreme Court in a similar manner. He referred to the judgement of the Constitutional Court in 1999, in the case concerning Dr. Stefanko, and asserted that the Court had approved the procedure taken by the Government and the Parliament.

V. PROCEDURE BEFORE PARLIAMENT

34. The Government's proposal was referred to the Constitutional and Legal Affairs Committee of Parliament by the Speaker of Parliament on 21 September 2000. The rules of procedure of Parliament require that this Committee review such a proposal. The current membership of the Committee is composed along political party lines. Of the 11 members, 6 are from the ruling coalition, 4 from the opposition and 1 is independent. The Committee does not have the powers of a court of law or the power to compel witnesses to appear, though it can invite persons to appear as a witness. The proceedings are therefore informal.

35. During the Committee's deliberations on his removal, Dr. Harabin appeared before the Committee to give evidence. On 31 October 2000, after deliberating for six sessions, the Committee approved the Government's motion to remove Dr. Harabin as President of the

Supreme Court and recommended that Parliament vote on the removal by secret ballot. The Committee also recommended that all communications addressed by the Special Rapporteur to the Government be placed before all members of Parliament.

36. The Special Rapporteur was informed that the voting in the Committee was split along political party lines.

37. During the mission the Special Rapporteur was informed that a majority of members of Parliament had approved a motion to invite the Special Rapporteur to address Parliament on the matter. At his meeting with the Vice-Speaker of Parliament, it was indicated to the Special Rapporteur that it was not necessary for the Special Rapporteur to address Parliament. It was agreed that the Special Rapporteur's report would be sufficient for consideration by the members of Parliament.

38. The Government's proposal to remove Dr. Harabin was listed as the last item on the agenda of the current session of Parliament which was scheduled to end on 22 December 2000. The Special Rapporteur inquired of the Vice-Speaker and the Committee on Constitutional and Legal Affairs whether the debate on this subject could be postponed to the following session to enable the Special Rapporteur to submit his report. The Special Rapporteur was informed that such a request could be put to Parliament and it would be up to the members to decide on the postponement.

39. After the mission the Special Rapporteur learnt that on 15 December 2000, the Minister of Justice had introduced the Government's proposal for debate in Parliament and requested a vote to be taken on 18-19 December 2000. The Minister of Justice was reported to have said in Parliament that there was no need for Parliament to wait for the report of the Special Rapporteur. The media also reported that the Minister of Justice had stated that the Government would not change its position despite the differing views of the Special Rapporteur.[a]

40. The Special Rapporteur sent another urgent communication to the Government on 18 December 2000 expressing his concern over the developments and issued a press release to that effect.

41. In moving the proposal in Parliament to remove Dr. Harabin, the Minister of Justice expressed the same grounds for removal as had been stated in the Government's earlier written response to the Special Rapporteur. The following statement of the Minister made in the course of his speech is noteworthy. "Some of these facts supporting the proposal to remove Dr. Harabin from the office of the Supreme Court President are sufficiently persuasive and substantial for the Government to submit the proposal to remove Dr. Harabin from the office of the President of the Supreme Court." The Minister added, the "Slovak judiciary needs to be led by a person symbolizing and serving as a model of professional and ethical development of the whole judiciary. It needs a leader who will bring judges of the Slovak Republic together instead of dividing them".

42. In Parliament the Minister also stated, "On our territory this structure of State administration of courts has a long tradition .... It is similar to the structure of the State

administration of courts in other countries such as Germany. This structure of State administration of courts is different from State administration in Anglo-Saxon territories, but there is a rationale behind it and a long-term tradition which makes it effective."

43. It was subsequently learnt that Parliament voted on the proposal on 19 December 2000 and it was defeated, with 60 voting for, 62 against and 15 abstentions. Hence the Government failed in its attempt to remove Dr. Harabin as the President of the Supreme Court. The Special Rapporteur received a communication from the Government to this effect on 19 December 2000.

VI. INTERNATIONAL AND REGIONAL STANDARDS

44. The following international standards are relevant to this issue:

(a) Article 10 of the Universal Declaration of Human Rights;

(b) Article 14 of the International Covenant on Civil and Political Rights;

(c) Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms;

(d) Principles 11, 12, 17, 18 and 19 of the United Nations Basic Principles on the Independence of the Judiciary;

(e) Paragraph 27 of the Vienna Declaration and Programme of Action, 1993;

(f) General Principle 1.3 of the European Charter on the Statute for Judges, 1998 and paragraph 5.1 of the Explanatory Memorandum to the Charter;

(g) Paragraph 3 of the Budapest Conclusions on the Guarantee of the Independence of Judges - Evaluation of Judicial Reform - 1998.

45. General Principle 1.3 of the European Charter on the Statute for Judges provides:

> "1.3 In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary."

46. Paragraph 3 of the Budapest Conclusions on the Guarantee of the Independence of Judges - Evaluation of Judicial Reform - 1998 provides:

> "3. The independence of judges must provide in return a system of disciplinary responsibility, guaranteeing the citizen an efficient and competent judicial power. This responsibility should be exercised according to procedures which ensure sufficient guarantees for the protection of individual rights and freedoms of the judge, following the rules laid down in article 6 of the European Convention on Human Rights, by an

independent authority, consisting of renowned judges. Dismissal or compulsory retirement, except for health reasons, should only be carried out on the basis of disciplinary procedures, which allow the possibility to appeal."

47. It is important to note that the minimum standards for the independence of the judiciary set out in the United Nations Basic Principles on the Independence of the Judiciary, endorsed by the General Assembly in 1985, was a compromise document and agreed to by the States of the Eastern Bloc.

VII. REFORMS TO STRENGTHEN THE INDEPENDENCE OF THE JUDICIARY

48. During the mission the Special Rapporteur learnt of a proposal by the Government to amend the Constitution and other relevant legislation to establish a new procedure for the appointment and removal of judges. Under the proposed amendments judges would be appointed and removed by the President of the Republic on the recommendation of a judicial council composed of 18 members, 9 of whom would be sitting judges. With regard to the appointment and removal of the President and Vice-President of the Supreme Court the proposed constitutional amendment reads:

"145 (3) The President of the Slovak Republic shall appoint the Chairman of the Supreme Court of the Slovak Republic and the Vice-Chairman of the Supreme Court of the Slovak Republic on a proposal of the Judiciary Council of the Slovak Republic from judges of the Supreme Court of the Slovak Republic for five years. The same person may only be appointed as Chairman or Vice-Chairman of the Supreme Court of the Slovak Republic for two consecutive terms. Before the expiry of the term of office, the President of the Slovak Republic may remove the Chairman or Vice-Chairman of the Supreme Court of the Slovak Republic for reasons stipulated by the law."

49. The Special Rapporteur was informed that these amendments are due to come into force in January 2001. The Special Rapporteur has since received a copy of the proposed amendments.

VIII. CONCLUSIONS AND RECOMMENDATIONS

A. Conclusions

50. It is not the role of the Special Rapporteur to interpret the laws and Constitution of a sovereign Member State. The mandate of the Special Rapporteur is to examine and bring to the attention of the State concerned, and the Commission on Human Rights in general, his opinion as to whether the judicial system and its processes are in conformity with the international and regional standards on the independence of the judiciary.

51. In the Slovak Republic the independence of the judiciary as an institution and the independence of individual judges are provided for under the Constitution. However, judicial appointment, promotion and removal procedures vest too much power in the executive and

legislative arms of the Government and in particular the Minister of Justice. These procedures are inconsistent with the concept of judicial independence as entrenched in the Constitution and provided for in regional and international standards for judicial independence.

52. Dr. Harabin was elected as President of the Supreme Court from among the judges of that court for a five-year term in accordance with article 145 (2) of the Constitution. The legality of his election is not questioned, although allegations have been made that it was a political one because the then Government's proposal for his election did not get the clear support of at least one of the two Councils of Judges.

53. It is pertinent to note that the Constitution provides only for the election of the President and Vice-President of the Supreme Court and for the appointment of the President and Vice-President of the Constitutional Court by the President of the Republic. Hence the office of the President and Vice-President of the Supreme Court are constitutional positions and not simple legislative appointments. The persons elected to these offices from among their peers for a fixed term of five years retain their status as judges and no distinction can be made between the offices.

54. The Government's contention that the office of the President is distinct from his office as a judge and as such the constitutional prerequisites for the removal of a judge do not apply to the removal of the same person as President of the Court is untenable.

55. The Government's contention that while acting in his capacity as President of the Supreme Court he is part of the executive arm of the Government conflicts with the very essence of an independent judiciary as provided for in article 141 of the Constitution. In effect it means that the President of the Supreme Court is a functionary of the executive.

56. Further, the constitutional security of tenure of five years given to the President is violated if he can be removed before the expiry of his term at the whims of the executive and Parliament. Security of tenure is one of the core values of judicial independence. In this context it is important to note that the Minster of Justice is reported to have said to the media, in response to a question regarding how often a President of a Court could be removed, that "if there are such reasons as those on which Dr. Harabin's recall is based then we can recall every week."[b]

57. During the mission the Special Rapporteur made it clear that he was not there to ascertain the truth or falsity of the grounds alleged by the Government as justifying Dr. Harabin's removal. He was only concerned with the process for such a removal.

58. Those who supported the removal, including the President of the Association of the Judges of Slovakia, agreed that the process was not appropriate but was justified because section 50 (2) of Act No. 335/1991 on Courts and Judges provided for it. The Minister of Justice also referred to section 8 of Act No. 80/1992 on State Administration of Courts to justify the Government's proposal.

59. The Special Rapporteur is of the view that these laws, even if applicable, are inconsistent with the minimum standards provided under international and regional instruments to secure an independent judiciary.

60. The Minister of Justice asserted that this procedure had been used previously to remove Vice-President of the Supreme Court Dr. Stefanko. The Minister also stated that the judgement of the Constitutional Court concerning the removal of Dr. Stefanko had approved this procedure for the removal from the office of President or Vice-President. In Parliament the Minister also referred to a more recent judgement of the Constitutional Court on a petition presented to it by Dr. Harabin, soon after the Government's proposal to remove him from the office of President of the Supreme Court. The Minister asserted that the judgement further supported the Government's contention on the correctness of the procedure. The Special Rapporteur has studied these judgements and found that the Court neither approved nor disapproved the procedure in these two cases. In any event the mere fact that such a procedure was adopted previously does not provide constitutional legitimacy to the present steps taken to remove Dr. Harabin.

61. It is inconceivable that a judge elected by Parliament to be the President of the Supreme Court for a fixed term could be removed from the office of President on mere allegations by the Government without those allegations being proved before a competent tribunal. The grounds asserted by the Government for the removal of Dr. Harabin, as stated earlier, remained mere allegations and still remain so. These allegations are serious enough to remove him as a judge through the disciplinary process specified in Act No. 412/1992 on Disciplinary Responsibility of Judges. That process has not been invoked by the Government.

62. The statement of the Minister of Justice in Parliament that "some of the facts supporting the proposal to remove Dr. Harabin ... are sufficiently persuasive and substantial" (emphasis added), is an indication that the Government may not have sufficient evidence to substantiate the grounds for removal before a disciplinary court.

63. Further, the Minister's statement in Parliament that the "Slovak judiciary needs to be led by a person symbolizing and serving as a model of professional and ethical development of the whole judiciary" is an indication of the importance of that office in the Slovak judicial system. It also indicates that the office of the President of the Supreme Court is indistinguishable from his judicial office. If such a distinction was acceptable a curious situation could arise. A person not fit for an administrative post because he/she is wanting in moral and professional authority will be seen to be and will remain a fit and proper person for the high office of a judge.

64. Judges are also entitled to justice. They are entitled to due process of the law if they are to be removed before the expiry of their term of office as provided by the law to secure their independence. Principles 17-20 of the United Nations Basic Principles on the Independence of the Judiciary underscore this point.

65. Laws, whether legislative, customary or traditional, cannot be justified if they are inconsistent with the essential values and standards which provide for the protection of an independent judiciary, particularly when such a provision for the judiciary is entrenched in the

Constitution. This is more so when the State concerned has ratified some of the major international and regional instruments on human rights. These essential values and standards are universal in application.

66. The Special Rapporteur is therefore of the view that the Government's attempt to remove Dr. Harabin as President of the Supreme Court through the parliamentary process, without proving its allegations before a competent tribunal provided for by law, violates international and regional standards to secure and preserve an independent judiciary. It therefore could be seen to be politically motivated.

67. The Government's haste in wanting to remove Dr. Harabin as President of the Supreme Court shortly before the coming into force of a constitutional amendment which provides for an independent mechanism for the appointment and removal of judges, including the President and Vice-President of the Supreme Court, further adds to the perception that the attempt to remove Dr. Harabin was politically motivated.

68. With regard to the proposed constitutional amendment to article 145 (3), it appears that Presidents or Vice-Presidents of the Supreme Court can be removed from their office before the expiry of their term by the President of the Slovak Republic without a recommendation of the Judicial Council. This is inappropriate considering that the same article expressly requires a recommendation from the Council for their appointment. The President and Vice-President must be given a fair hearing by a competent tribunal provided under the law.

69. The conduct of the Government throughout the attempted removal of Dr. Harabin, by making public allegations against him and by only providing Dr. Harabin a forum for defence through the parliamentary legislative process, has severely politicized and divided the judiciary.

70. Finally, the Special Rapporteur wishes to express his appreciation to the UNDP office in Bratislava for all the cooperation and assistance extended to him, including the provision of internal transport facilities during the mission. However, owing to reservations expressed over the use of the UNDP office premises for the press conference at the end of the mission, the Special Rapporteur used the premises of the Supreme Court.

B. Recommendations

71. The Special Rapporteur commends the deputies of the Slovak Parliament for having defeated the Government's motion to remove Dr. Harabin as President of the Supreme Court. Parliamentary democracy in the Slovak Republic and in particular supremacy of Parliament under the Constitution is clearly demonstrated in this matter. By following this course Parliament has upheld the independence of the judiciary of the Slovak Republic.

72. The Special Rapporteur welcomes the proposed amendment to establish an independent judicial council to advise on the appointment and removal of judges, including the appointment of President and Vice-President of the Supreme Court. However, the Special Rapporteur recommends that the removal of the President or Vice-President before the expiry of the term of office must be for reasons provided by the Constitution for the removal of judges and must be on the recommendation of the Judicial Council. Once elected, Presidents and Vice-Presidents of the

Supreme Court should continue to be regarded as holding judicial office. This is simply due to the fact that they earned their appointments to these positions by virtue of their judicial offices. If they are not fit to remain as President or Vice-President they may not be fit to remain in the high office of a judge.

73. The divisions within the judiciary that have occurred owing to the politicization of the attempted removal of Dr. Harabin have to be addressed so as to close ranks, heal the differences and reconcile. This is necessary in the interest of a unified judiciary for the dispensation of justice in accordance with a just rule of law. Therefore, the President and Vice-President should put aside their differences and work closely for the advancement of a sound and efficient justice system for the people.

74. The Supreme Court should be housed in adequate, distinct and separate premises from the Ministry of Justice or any other government department so that this apex court of the Slovak Republic will be seen as independent from the executive arm of Government.

Notes

[a] TASR-Slovakia, 15 December 2000.

[b] Slovak Republic (daily newspaper), 2 November 2000.